THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION NO.6075 OF 2006

DATED: 13th JULY, 2006.

Between :

M/s. United Freight Carriers (Vizag) Pvt. Ltd.,
incorporated under the provisions of the Companies
Act, having its registered office at United Enclave,
Plot No.165A/1, APIIC Layout, Pedagantyada,
Visakhapatnam, rep. by its Managing Director
P. Mohan Das, S/o. Late K.M. Sethu Madhavan Nair,
Aged 48 years, R/o. Visakhapatnam. .. Petitioner

And

1. Rashtriya Ispat Nigam Limited, Visakhapatnam
   Steel Plant, rep. by its Chairman & Managing
   Director, Visakhapatnam and 5 others. … Respondents

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WRIT PETITION NO.6075 OF 2006

ORDER :

The 1st respondent – Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant, issued a tender notice dated 1-12-2005 inviting sealed tenders from experienced / established agencies for appointment as Consignment Agent for handling and storage of pig iron and steel materials of Visakhapatnam Steel Plant at different places including Kochi and Bhubaneswar. The petitioner who claims to be a company incorporated under the provisions of the Companies Act got the tender document downloaded through the website and submitted its tenders within the time prescribed in respect of Bhubaneswar and Kochi. It is stated that the petitioner had satisfied the prescribed eligibility criteria and fully qualified to participate in the tender. However, on 6-1-2006 when the technical bids of the tenderers were opened, the petitioner was orally informed that he was disqualified on the ground that the experience certificate produced by the petitioner, to show that he had handled similar work as mentioned in the tender schedule, speaks about loading/un-loading and not both. The petitioner made a representation dated 15-2-2006 requesting the respondent to verify the certificate/work order issued by M/s. Chamundi Industries Limited with whom he executed similar work. However, the respondents did not consider the same, but on the other hand opened the price bids of the qualified bidders on 22-3-2006. Aggrieved by the said action of the respondents, this writ petition is filed seeking a declaration that the rejection of the technical bid of the

petitioner company on flimsy ground and without informing the same in writing is arbitrary, illegal and violative of Article 14 of the Constitution of India, and consequently direct the respondents to open the price bid of the petitioner company and in the event the petitioner is found suitable to award the contract in its favour.

I have heard the learned Counsel for the petitioner as well as the learned Counsel appearing for the respondents; and perused the material on record.

Clause-5 of the Notice Inviting Tender (NIT) which prescribes the special conditions runs as under :

> *"**Special Conditions** : The tenderers shall be consignment agents / handling agents / manufacturers / stevedores etc., **having experience in operating all activities of unloading from trucks / trailers/rakes etc., stacking, loading, etc. from the stage of receipt of material to the stage of dispatch of material** and should have handled pig iron and / or steel materials (semis and furnished products) / heavy machinery / any metal products for a minimum tonnage in any one of the preceding five financial years or current financial year with a grace provision of (-) 5 %, should have minimum turnover and should have land for a minimum area either in their own name or held through a registered lease deed for 8 years as mentioned in the tabulation below. The experience certificate should also mention that the tonnage has been considered only once wherever the material is handled more than once."*

So far as Kochi is concerned, the minimum tonnage handled was fixed as 40401 MT per year with minimum annual turnover of Rs.1,86,00,000/- and for Bhubaneswar the same was mentioned as 17552 MT with minimum annual turnover of Rs.47,00,000/-.

It is also necessary to extract Clause-11 of the Instructions to the Tenderers, which runs as under :

> *"For participation in the tender, the tenderers should have the experience/qualification as mentioned below and submit the documents as mentioned below along*

with the tender. .. … … ….. …

i) The tenderers shall be Consignment Agents / Handling Agents / Manufacturers / Stevedorers, etc., having experience in operating all activities of unloading from trucks/trailors/rakes etc., stacking, loading etc., ***from the stage of receipt of material to the stage of dispatch of material*** *and should have handled Pig Iron and/or Steel materials (semis & furnished products) / Heavy Machinery / any metal products for a minimum tonnage with a grace provision of (-) 5% as mentioned in the Open Tender Notice in any one of the preceding five financial years or the current financial year. The experience certificate should also mention that the tonnage has been considered only once wherever the material is handled more than once.*

Proof of such experience should be submitted along with the tender in the following manner. The experience as traders, sister concerns and the experience certified by traders and sister concerns will not be considered.

(a) In case of material handled on contract basis, a certificate (in original) should be submitted from the Employer in the format enclosed as Annexure-II. The certificate should also mention the tonnage handled. The certificate should also mention that the tonnage has been considered only once, wherever the same material is handled more than once. In case the Employer is a private party, the certificate should be supported by copies of Work Order / Agreement and TDS Certificates.

(b) In case of material handled during the course of manufacturing, a certificate (in original) should be submitted from a Practising Chartered Accountant in the format enclosed as Annexure-III. The certificate should be supported by copies of documents such as quantitative details from Audited Accounts to prove physical handling of material."

The petitioner claims that it comes under the category of handling agents and in support of its experience as required under Clause-5 of the N.I.T., the petitioner produced the experience certificate issued by M/s. Chamundi Industries along with the work

order in respect of two different, separate and independent works.

It is not in dispute that the work order produced by the petitioner shows two works undertaken for M/s. Chamundi Industries Limited during the financial year 2000-01. The nature of the work and the volume handled was described as under :

> *"(1) Collection of M.S. Billets, Squares etc., from M/s. Visakhapatnam Steel Plant, Visakhapatnam and transportation to your Stockyard unloading, stacking, cutting, loading into trucks and transportation to our works at Bangalore. The rate will be Rs.975/- per ton includes all activities of clearing, forwarding, liaisoning etc., No extra charges will be paid.*
> *(2) Shifting, stacking, loading/unloading of steel materials at our Factory at Bangalore. Rate will be Rs.35/- per ton."*

The quantity of the said two works was shown as 11,124.935 MT and 29,279.28 MT respectively.

Whereas the petitioner claims that the said experience certificate produced by the petitioner together with the work order satisfied the tender conditions, the respondents contended that the experience of the petitioner against the second work under the work order did not cover the experience of operating all activities from the stage of receipt of material to the stage of dispatch of materials, but it merely reflected the experience of shifting, stacking, loading/unloading of steel materials and therefore cannot be taken into consideration. Thus, according to the respondents, the petitioner did not satisfy the condition of experience prescribed under clause-5 of N.I.T.

In the counter-affidavit filed on behalf of the respondents 1 to 5, it is explained that the second work executed by the petitioner as described in the work order did not involve both loading and unloading besides all other activities required. While mentioning the line of activities involved from the stage of receipt of the material to the dispatch of material, in case of rail-receipts and in case of road-receipts, it is stated that the tender committee noted that the

experience of the petitioner against the second work was not covering the experience of all activities from the stage of receipt of material to the stage of dispatch of material. The activities from the stage of receipt to the dispatch of material which are shortcoming in the experience claimed by the petitioner were mentioned as under :

"(a) Verification of receipt documents.
(b) Tallying the material with documents through physical verification.
(c) Gross-weighment of the vehicle.
(d) Taking tare weighment of the vehicles after unloading.
(e) Stacking the material product-wise and grade-wise.
(f) Providing dunnage.
(g) Taking tare weighment before loading.
(h) Gross-weighment after loading.
(i) Completion of documentation and accounting.
(j) Stock management.
(k) Stockyard maintenance management including security."

Since the N.I.T. requires that the tenderer should have experience in all the activities from the stage of receipt of material to the dispatch of material and since the nature of work involved in consignment agency required a contractor to undertake all the activities, the tender committee opined that the petitioner did not satisfy the requisite past experience. The tendering process does not involve sending of any communication to the tenderer in the event of failure to satisfy the technical qualification criteria. The plea of the petitioner that he was orally informed about the rejection of the technical bid has been denied.

So far as the representation made by the petitioner, it is stated that having considered the same, the respondents found that it has no merit. The Chief Vigilance Officer of the respondent Organisation also conducted an enquiry and found that the decision taken by the respondents cannot be faulted. Since the petitioner was disqualified in technical evaluation, no intimation was sent to the petitioner before

opening the price bids and the unopened price bid and Earnest Money Deposit (EMD) of the petitioner would be returned. After opening the price bids, it was found that the existing contractors at both places i.e., Kochi and Bhubaneswar were found to be the lowest bidders. The other allegations made by the petitioner are categorically denied and it is stated that the respondents have scrupulously followed the procedure prescribed in the NIT.

The successful bidder in respect of the work at Kochi, who got itself impleaded as respondent No.6, in its counter-affidavit stated that being the successful tenderer it had already submitted the security and performance Bank guarantee in compliance with the terms and conditions of the letter of intent, and that the technical evaluation done by the experts cannot be interdicted.

From the details furnished in the counter-affidavits filed on behalf of the respondents and the record placed before this Court by the learned Counsel for the respondents 1 to 5, it is clear that as per the conditions of NIT with regard to the eligibility criteria, the tenderers should have handled 40401 MT and 17552 MT minimum tonnage in respect of the works at Kochi and Bhubaneswar respectively. Clause-5 of the tender notice, extracted above, makes it clear that the tenderer should be either a consignment agent or handling agent or manufacturer or stevedorer etc., who has ***experience in operating all activities of unloading, stacking, loading etc., from the stage of receipt of material to the stage of dispatch of material*** and should have handled Pig Iron and/or steel materials (semis and furnished products) / heavy machinery / any metal products for the minimum tonnage as noted above in any one of the preceding five financial years or current financial year. In view of the language in Clause-5 specifically mentioning that the tenderers shall have experience in operating all activities of unloading, stacking, loading from the stage of receipt of material to the stage of dispatch of material, the plea of the petitioner that the tender notice was vague and

lacking in material particulars is apparently incorrect. That apart, clause-11 (i) of the instructions to tenderers which forms part of tender document also reiterates that the tenderer shall have experience in operating all activities of unloading from trucks/trailers/rakes etc., stacking, loading, etc., from the stage of receipt of material to the stage of dispatch of material. The terms and conditions of contract which are included in Vol. (1) of the tender document also made it clear that the consignment agent shall be required to do all the work involved from the stage of dispatch to the plant till the stage of dispatch to the customers. The said clauses 9.1 and 9.2 may be extracted hereunder :

> *"9.1. The Consignment Agent shall handle the arrivals, stacking, storage including security and deliveries of iron and steel materials dispatched to the said yard as directed by the Company / its authorised representative. The Consignments will be received / dispatched by rail and / or by road.*
>
> *9.2. The Consignment Agent shall be required to do all the work involved from the stage of dispatch from the Plant, receipt and clearing of consignments arriving by rail/road, their unloading, loading into trucks, transportation as required, stacking, storage in the yard, straightening, cutting, bending and bundling when required and delivery after weighment to the customers either ex-yard or by rail or road as advised by the Company. The scope of work is morefully described in the Schedule of Rates."*

Clause-3 of the instructions to the tenderers made it very clear that the tenderers are at liberty to discuss with the Officers of the Marketing Department to study and get familiarized with the nature and magnitude of the services required of him. The said clause-3 of the instructions to the tenderers runs as under :

> *"3. The tenderers may, by prior appointment, discuss with the officers of Marking Department of VSP with a view to study for himself and how the stockyard is envisaged to be set up and operated and familiarize himself with the nature and magnitude of the services required of him including requirement of land, rail*

facilities, weighbridge etc. By submitting a quotation, the tenderer will be deemed to have fully familiarized himself with and considered the scope of work, working conditions including terms and conditions of contract forming part of the Tender Documents."

As a matter of fact, Vol. (2) of the tender document relating to schedule of rates which is required to be filled in and submitted in a separate sealed cover by the tenderers described the scope of the work more fully and clearly that the tenderers are required to quote the schedule of rates separately against each item for the complete work right from receipt of consignment upto the stage of dispatch both for pig iron and steel.

Admittedly, the technical bids were processed by a duly constituted tender committee who had opined that the petitioner did not satisfy the requisite past experience. The record placed before this Court by the learned Counsel for the respondents shows that the issue was considered in detail in the meetings held on 24-1-2006 and 25-1-2006 in the office of the Additional General Manager (Marketing) and it was recorded in the minutes that the quantity of work executed by the writ petitioner did not fulfill the minimum quantity requirement, and therefore his technical bid did not meet the requirement of experience as per the terms of NIT, which is a fatal condition. Thereafter, on a representation made by the petitioner, dated 7-2-2006 and 15-2-2006 addressed to the Chief Vigilance Officer, Visakhapatnam with copies marked to various senior officers, the matter was reconsidered in the meetings held on 13-2-2006 and 14-3-2006 in the office of the Additional General Manager (Marketing), and on verification of the relevant documents it was found that the earlier decision of the tender committee was in order. From the record placed before this Court, it is clear that the petitioner was disqualified not on the ground that in the work order issued by M/s. Chamundi Industries it was mentioned ***loading / unloading*** and thus assuming that the petitioner company did not handle loading as well as unloading. Hence, the contention of

the petitioner that the rejection of the technical bid of the petitioner was on a flimsy and technical ground is absolutely incorrect and appears to be an after-thought for the purpose of the present writ petition.

The record placed before this Court also discloses that the technical bid offered by the petitioner was rejected also on the ground that the profit and loss account for the year 2000-01 submitted by the petitioner does not reflect any income from handling charges account which indicates that the petitioner was only a Goods Transport Agency engaged by M/s. Chamundi Industries Limited against the first work covered by the work order. It was also found that the petitioner did not possess service tax registration during 2000-01.

Though the petitioner contends that the concept of payment of service tax was not in vogue when the petitioner executed the work with M/s. Chamundi Industries, the same cannot be accepted since the services of clearing and forwarding agents have been brought into the net of service tax by the Finance Act, 1997 w.e.f. 16-7-1997 itself. Similarly, cargo handling services have been subjected to service tax by the Finance Act, 2002 w.e.f. 16-8-2002. Hence, the non-registration of the petitioner under the Service Tax Rules during the year 2000-01 undoubtedly is a relevant aspect to be taken into consideration.

The law with regard to the scope of judicial review in the matter of award of contracts by the State and its instrumentalities is well settled. In ***Tata Cellular Vs. Union of India***[1], the apex Court having considered the said issue in detail laid down the following principles:

> "…1. The modem trend points to judicial restraint in administrative action.
>
> 2. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> 3. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

Again in ***Air India Limited Vs. Cochin International Airport Limited***[2], the Supreme Court after reviewing all the relevant decisions on the said aspect reiterated the principles governing the award of contract by the State and its instrumentalities.

"..The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms; standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect

> is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

Thus, it is clear that though it is open to examine the decision making process, the decision as such will not be subjected to appellate scrutiny by this Court. Even the decision making process has to be tested on limited grounds by application of Wednesbury principle of reasonableness and by examining whether the decision making is free from arbitrariness or mala fides.

In the case on hand, there is absolutely no pleading or any material to show that the respondents were influenced by any extraneous considerations during the decision making process. The mere fact that the existing contractors were found to be the successful bidders cannot be taken as a ground to allege mala fides against the respondents.

As noted above, the tender committee consists of the senior officials of the 1st respondent who after thorough enquiry opined that the technical bid of the writ petitioner did not meet the specifications prescribed under the eligibility criteria. There is no reason for this Court to interfere with the said decision unless an element of arbitrariness is made out or the decision is shown to be vitiated on account of mala fides or it can be termed as so unreasonable that no reasonable authority could have ever arrived at. On the basis of the material on record, none of the said grounds is made out by the petitioner.

In the circumstances, I am of the opinion that the judicial review under Article 226 of the Constitution of India is not warranted. The action of the respondents in declining to open the price bid of the petitioner cannot be held to be either illegal or irrational much less

vitiated on account of any error of law.

The writ petition is devoid of any merit and the same is accordingly dismissed. No costs.

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G. ROHINI, J.

Dt. 13-7-2006
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[1] (1994) 6 SCC 651;

[2] 2000 (2) SCC 617;